No. 12736

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GLOBE WIRELESS, LTD., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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This reply brief is filed to clarify certain misconceptions which pervade respondent's brief.

I

Respondent states the crucial issue to be whether the 19 employees *could* have had their jobs back before being replaced. This issue would be material if the employees had remained merely economic strikers. Respondent, however, *discharged* the employees promptly upon their going on strike.[1] A striking employee who, before he has abandoned the strike and asked for his job back, has been discharged outright

[1] The Board's finding that these employees had in fact been discharged finds ample support in the record. See main brief, pp. 5, 6, 7–8, 32–33, and record references there cited.

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for going on strike, is by the act of discharge injured in the exercise of his rights under the Act, in that his employer has acted to terminate his employment notwithstanding the statutory protection which the strike enjoyed.

Such an employee thus differs from a mere economic striker whose injury arises only if he is discriminatorily denied reinstatement upon his request. One unlawfully discharged is therefore entitled to restoration of his position as at the time of the discharge, regardless of whether he has thereafter been replaced, and irrespective of whether he has asked the employer to rescind the unlawful discharge.[2]

In the instant case, since the employees were *discharged* for going on an economic strike, the "crucial issue" is not whether they were replaced, but whether their action in striking was so illegal as to strip them of the protection which the Act normally extends to economic strikers. See main brief, pp. 21–24, and see *infra,* Point IV.

II

Respondent's confusion of the rights of "dischargees" with those of "economic strikers" apparently also accounts for its misreading of the Board's

[2] An employee who has been unlawfully "fired" is not required to undergo the presumably useless act of asking the employer for his job. He is entitled to act on the belief that the employer meant what he said. An economic striker, on the other hand, has stopped work of his own volition and (unless, as here, he is thereafter discharged), must request reinstatement. *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780, 792 (C. A. 9), certiorari denied, 312 U. S. 678; *Eagle-Picher Mining & S. Co.* v. *N. L. R. B.*, 119 F. 2d 903, 913–915 (C. A. 8).

order. Contrary to respondent's repeated statement (Resp. Br., pp. 6, 22, 52) the order (R. 91–95) requires an immediate offer of reinstatement; *back pay,* however, is conditioned upon the date of the abandonment of the strike. The reason for conditioning the amount of back pay but not the offer of reinstatement is clearly stated in the Board's decision (R. 92–93), and is apparent from the considerations discussed in Point I, *supra.* The *discharge* was an unfair labor practice; hence the employees are entitled to an offer of reinstatement. However, at the time of the discharge they were also on strike and hence they did not begin to sustain losses in wages until they abandoned the strike.[3]

Respondent also contends that the order is too broad. The broad cease and desist order of which respondent complains would be valid even if respondent had violated only Section 8 (a) (3)—see, *N. L. R. B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C. A. 4)—or even if respondent had violated only Section 8 (a) (1) in the manner here found—see *N. L. R. B.* v. *Sunbeam Electric Mfg. Co.,* 133 F. 2d 856, 861–862 (C. A. 7); *N. L. R. B.* v. *Bailey Co.,* 180

[3] Respondent's observation that the back-pay order is indefinite as interlocutory is altogether correct but quite irrelevant. The courts have long recognized that back-pay orders after court enforcement are subject to the usual post-decree proceedings before the Board for determination of the specific amounts due under the order as enforced. *N. L. R. B.* v. *Carlisle Lumber Co.,* 99 F. 2d 533, 539 (C. A. 9), certiorari denied, 306 U. S. 646; *N. L. R. B.* v. *Norfolk Shipbuilding Co.,* 172 F. 2d 813, 816–817 (C. A. 4); *Wallace Corp.* v. *N. L. R. B.,* 159 F. 2d 952, 954–955 (C. A. 4); *N. L. R. B.* v. *Bird Machine Co.,* 174 F. 2d 404, 405–406 (C. A. 1).

F. 2d 278, 280 (C. A. 6). *A fortiori,* the order is valid where respondent has violated both sections.

III

Respondent's attack upon the Board's jurisdiction rests on the alleged invalidity of the charges. The charges appear on their face (R. 5–8) to be executed by the individual complainants, not by the union, and the lnion derives no direct benefit from this proceeding. Consequently, any evidence as to the union's role in the preparation of the charges is irrelevant under the *Augusta* and *Clausen* decisions cited in our main brief, p. 35, and ignored in respondent's brief.

Respondent's basis for attacking the complaint as unsupported by the charges is difficult to grasp. Respondent's contention appears to be that the six-month period of limitations bars the Section 8 (a) (1) allegations of the complaint. But the Board in its complaint is not limited to the violations alleged in the charge. On this point, to the authorities cited in our main brief, pp. 27–28, may now be added *N. L. R. B.* v. *Westex Boot & Shoe Co.,* 28 L. R. R. M. 2220 (C. A. 5, decided June 25, 1951). The record establishes that the complaint itself issued within the six-month period, thus giving respondent timely notice of the violations with which it was charged.

IV

Respondent's contention that the employees violated the Federal Communications Act is treated at pp.

21–23 of our main brief.[4] Respondent now argues that a California statute outlaws the strike. Such a contention would at once raise a constitutional question since the statute as thus interpreted would unlawfully invade a federally protected right. *Amalgamated Assn.* v. *Wisc. E. R. B.*, 340 U. S. 383, 389–399. However, the court need not grasp that nettle since it is plain from a fair reading of the statute (quoted at Resp. Br., p. 16) that it was not intended to cover a strike situation.

Respectfully submitted.

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[4] Respondent attempts to buttress its argument under that Act by relying on Section 217 which renders respondent liable for acts of an employee committed *within the scope of his employment.* The italicized phrase reveals both the purpose of the section and its inapplicability to employees on strike. Respondent's free confession that it "unlawfully breached its duty as a public utility" (Resp. Br., p. 47), has a hollow ring in view of the apparent absence of any action ever brought against it for such self-confessed "breach." We rather suspect that respondent instead of confessing liability would vigorously argue that strike action was outside the intent of the section.

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